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IN THE

Supreme Court of the United States

October Term, 1948
No. 390

HENRY M. PROPPER, as Receiver of the Property and Assets within the State of New York of A.K.M.,

Petitioner,

against

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT DEEMS TAYLOR

LOUIS D. FROHLICH,
Attorney for Defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers.

HERBERT T. JACOBY,
On the Brief.

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit (II R. 4) is reported at 169 Fed. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for lack of finality is reported at 163 Fed. 2d 940.

Jurisdiction

The judgment of the Court of Appeals was rendered on August 3, 1948 (H R. 47). The petition for writ of certiorari was filed October 30, 1948 and granted in part on January 3, 1949. The jurisdiction of this Court is founded on Section 1254 of Title 28 of the United States Code.

Questions Presented

Petitioner claims to have been designated by a New York court as the temporary receiver of the assets of an Austrian national, which appear to have consisted solely of an alleged debt from a third person. The appointment took place two days before the "freezing" by Executive Order of all transactions in Austrian property. After the date of "freezing", petitioner was designated permanent receiver. Some time thereafter the alleged debt was vested by the Alien Property Custodian.

The writ of certiorari is limited to the following questions:

(1) Whether, under New York law, title to the debt in suit passed to the petitioner prior to the date of "freezing", by virtue of his appointment as temporary receiver.

(2) Whether, in the absence of license, title to the debt in suit passed to the petitioner after the date of "freezing", by virtue of his appointment as permanent receiver.

Statutes Involved

The text of the statutes and Executive Orders involved on this appeal are contained in the Appendix to the Government's Brief and, accordingly, have not been reproduced.

Statement

This proceeding is one by the Attorney General, as successor to the Alien Property Custodian, against Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP) and Henry M. Propper, as Temporary Receiver in New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (hereinafter referred to as AKM). The complaint, so far as pertinent to this appeal, seeks an adjudication that the Custodian has right, title and interest superior to that of defendant Propper in certain moneys allegedly owed by ASCAP to AKM, as well as judgment against ASCAP for such moneys (I R. 7-11, 14-15).

Cross-motions were made by defendant Propper (I R. 70-71) and by the Custodian (I R. 92-93) for summary judgment as against each other. The District Court (Coxe, D. J.) granted the Custodian's motion, and a judgment was thereupon entered adjudging that defendant Propper had no right, title or interest in any property held by ASCAP belonging to AKM (I R. 152-153).

Defendant Propper appealed to the Court of Appeals for the Second Circuit (I R. 154-155). That Court dismissed the appeal for lack of finality, on the ground that no judgment had been entered against defendant ASCAP for the amount due. *Clark* v. *Taylor*, 163 Fed. 2d 940.

Thereafter, plaintiff and defendant ASCAP entered into a stipulation (II R. 4-6) to the effect that the royalties allocable by ASCAP to AKM for the period in suit aggregated $46,839.54, after payment of all federal, state and

local taxes thereon, and that a judgment for that sum might be entered, without prejudice to the right of ASCAP to file any claim under the Trading with the Enemy Act, or otherwise, to secure payment of any debts, claims or demands owing by AKM to ASCAP. A final judgment based upon that stipulation was then entered at a pre-trial hearing before District Judge Coxe (II R. 25-26).

Defendant Propper appealed from that judgment to the Court of Appeals for the Second Circuit (II R. 27-28). That Court affirmed the judgment (169 Fed. 2d 324). On January 3, 1949, this Court granted certiorari limited to questions 1 and 2 presented by the petition for the writ (II R. 48).

The Facts

Defendant ASCAP is an unincorporated association created under the laws of the State of New York and is engaged in the business of granting licenses and collecting royalties for the public performance of the musical works of its members and alloting and distributing such royalties among them (I R. 5, 118). AKM was, and presently is, an Austrian organization engaged in Austria in business activities similar to those engaged in by ASCAP in the United States (I R. 8, 118). On January 1, 1933, ASCAP and AKM entered into a written contract (I R. 16-28) under which each would have the exclusive right to license in the country in which it did business the public performance of the musical compositions in the repertoire of the other. It was further agreed that each party should account to the other on the basis of a formula set forth in the contract (I R. 8-9, 118).

It is alleged in the complaint that for the period from January 1, 1933, to December 31, 1938, a net sum of $62,809.85 became due and owing under this contract from ASCAP to AKM (I R. 9). In its answer, defendant ASCAP alleged that substantial sums had become due from AKM to ASCAP under the contract, no part of which had been paid, and that in truth and in fact the credit balance between the parties was in favor of ASCAP, rather than AKM (I R. 68-69).

Commencing in February, 1939, a series of actions had been brought in the Supreme Court of the State of New York for the County of New York by a small group of persons, all represented by the attorney representing the petitioner herein, seeking to acquire for themselves the funds allegedly held by ASCAP for the account of AKM (I R. 103-104). All of those actions proved abortive. Finally, on June 9, 1941, one Franz Sobotka filed a petition in the Supreme Court of the State of New York for the County of New York alleging that he was a creditor of AKM and that AKM was a foreign corporation which had been liquidated leaving assets within the State (I R. 31, 49). By that petition he sought the appointment of a receiver of such assets pursuant to Section 977(b) of the New York Civil Practice Act (I R. 9, 31, 118).

On June 12, 1941 an *ex parte* order was entered appointing defendant Propper as temporary receiver, upon filing a bond in the sum of $1,000, and directing him "to take, receive and reduce to his possession any and all assets, property, credits and choses in action and property, tangible and intangible, within the State of New York" be-

longing to AKM (I R. 49-51). Almost immediately thereafter, Sobotka made an application to remove Propper or, in the alternative, to vacate the order appointing him temporary receiver, because of his refusal to retain the attorney representing Sobotka (I R. 61-62). This dispute was compromised and on July 7, 1941 an order was entered providing for the retention by the receiver of counsel chosen by Sobotka, as well as attorneys of his own selection (I R. 61-63).

On July 9, 1941 (I R. 10, 79) defendant Propper, having qualified and filed his bond on July 7, 1941, caused to be served upon defendant ASCAP a written notice of his appointment as temporary receiver, together with a demand for the delivery to him of the assets and property of AKM, alleged to be held by ASCAP (I R. 52-55). Prior to the service of that demand, and on June 14, 1941, Executive Order 8389 (5 F. R. 1400) had been amended so as to include Austria and nationals of Austria among those whose property was subject to the "freezing" regulations (6 F. R. 2897). When ASCAP refused to comply with the demand, defendant Propper, as temporary receiver, commenced an action against ASCAP in the New York Supreme Court on July 29, 1941, seeking to recover the sums allegedly due from ASCAP to AKM (I R. 10, 33-34). ASCAP interposed an answer in that action asserting, among other things, that Executive Order 8389, as amended, prohibited the transfer to the temporary receiver of any assets or claims belonging to AKM (I R. 96-97, 100).

On September 29, 1941 a default judgment was entered in the receivership proceeding against AKM (I R. 56-60). Under that judgment defendant Propper was appointed

permanent receiver, but no attempt was made to substitute the permanent receiver for the temporary receiver in the action which had previously been instituted against ASCAP.

Shortly after issue was drawn in the State Court action, the war in Europe broke out. On April 11, 1942, defendant ASCAP sought an order staying Propper from the further prosecution of his action until three months after the termination of the state of war then existing between the United States and Germany (I R. 119). That application was granted by the New York Supreme Court by order dated May 16, 1942, which was affirmed by the Appellate Division, First Department, on February 6, 1943 (*Propper v. Taylor*, 265 App. Div. 1049).

While the aforementioned stay was in force and effect, and on September 4, 1943 the Alien Property Custodian, acting under the authority of Section 5(b) of the Trading with the Enemy Act and Executive Order 9095, issued Vesting Order 2097, purporting to seize all of the property of AKM in the United States, as well as the property of a number of other European performing rights societies (I R. 112-116). On September 11, 1943 the Custodian made written demand upon ASCAP for delivery to him of all royalties due AKM under the contract of January 1, 1933 (I R. 10, 67).

Defendant ASCAP, confronted with the conflicting claims of Propper and the Custodian, made an application pursuant to Sections 83 and 210 of the New York Civil Practice Act to substitute the Custodian as party plaintiff in the State Court action, in place and instead of defendant

Propper (I R. 121). Notice of that application was given to the Custodian, who appeared specially for the purpose of contesting the State Court's jurisdiction over him (I R. 139-142). The motion for substitution was denied at Special Term and, in lieu thereof, the Court directed that "unless the Custodian shall voluntarily procure himself to be made co-plaintiff in this action" within a specified period of time "he will be barred and foreclosed of any and all right, title and interest in the subject matter of this action". (*Propper* v. *Taylor*, 186 Misc. 72.)

An appeal was then taken from that order to the Appellate Division, First Department. On April 18, 1946, that Court reversed the ruling of the Special Term, on the ground that the State Court had no jurisdiction over the Custodian and could make no order affecting his title to the property of AKM (*Propper* v. *Taylor*, 270 App. Div. 890). A few days thereafter and on April 22, 1946, this action was instituted by the Custodian in the United States District Court for the Southern District of New York against both ASCAP and Propper, seeking a money judgment against defendant ASCAP and a declaration that defendant Propper as receiver had no interest in any such recovery (I R. 7-11, 14-15).

No proceedings have been taken in the State Court action since April, 1946, when the Federal Court action was instituted. In the meantime the Federal Court action has proceeded to the final judgment here under review.

Summary of Argument

Defendant ASCAP's sole interest in this appeal is to obtain a determination as to the priority of the conflicting claims asserted against it by defendant Propper and by the Attorney General, as successor to the Custodian. That determination necessarily involves a construction of the legal effect of Executive Order 8389, as amended on June 14, 1941, in the light of the provisions of Section 977 (b) of the New York Civil Practice Act.

Petitioner maintains that upon his appointment as temporary receiver, two days prior to the effective date of the regulation "freezing" the assets of Austrian nationals, he acquired title to the debt which is the subject of this action. He further contends, in any event, that the "freezing" regulations, even if applicable to the transaction, did not prevent the subsequent vesting of the debt in him upon his appointment as permanent receiver, but merely prohibited the payment thereof without a license.

The Attorney General asserts that, prior to June 14, 1941, petitioner had acquired no interest whatever in the property of AKM, but merely a right to reduce such property to possession. Based upon that premise, the Attorney General argues that after June 14, 1941 the "freezing" regulations operated to prevent the acquisition by petitioner of any interest in the debt, and that title thereto passed to the Custodian under his subsequent Vesting Order.

Throughout this litigation defendant ASCAP has concurred in the position asserted by the Government (R. 125). Accordingly, it adopts the contentions of the At-

torney General on this appeal. In this brief it urges only that the courts below properly exercised jurisdiction over this controversy and that, under New York law, petitioner did not acquire, prior to June 14, 1941, such an interest in the debt in suit as to be unaffected by the impact of the "freezing" regulations as amended on that date.

I.

Petitioner by his appointment as temporary receiver did not acquire such an interest in the debt in suit as to be unaffected by the impact of Executive Order 8389, as amended on June 14, 1941.

The petitioner attempts to avoid the implications of Executive Order 8389, as amended on June 14, 1941, by asserting that the order made on June 12, 1941, appointing him temporary receiver automatically vested him with title to the debt in suit. That claim conflicts with the well settled law of New York with respect to temporary receivers and finds no support in the provisions of Section 977(b) of the New York Civil Practice Act.

The New York courts have consistently differentiated between temporary and permanent receivers. *Decker* v. *Gardner*, 124 N. Y. 334 at 338. The distinction in the powers of the two types of receivers has been recognized and preserved by statute (Cf. Section 162 of the N. Y. General Corporation Law with Section 168). Under New York law, a temporary statutory receiver, like a temporary equity receiver, takes no title to the corporate assets, but acquires only a right of possession. See: *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488 at 494 (and cases there cited).

Nealis v. *American Tube & Iron Co.*, 150 N. Y. 42, upon which petitioner relies, although employing loose language, actually holds nothing to the contrary. That case involved only the question of whether the temporary receiver had power to maintain an action to set aside a fraudulent transfer without making the insolvent corporation a party defendant. The very statute under which the action was brought expressly gave the temporary receiver such power. N. Y. Code of Civil Procedure, Section 1788 (now N. Y. General Corporation Law, Section 162).

There is nothing in Section 977-b) of the New York Civil Practice Act indicative of a legislative intent to depart from long established precedent. On the contrary, subdivision 4 of the statute provides that the temporary receiver appointed thereunder (like other temporary receivers) is to "take, receive and reduce to his possession" the assets of the foreign corporation and "hold the same until the further order of the court". Read in its chronological context, subdivision 19 which provides that "title to all assets * * * shall immediately vest in the receiver upon the making of the order appointing him", necessarily relates to the permanent receiver, whose appointment is provided for in subdivision 10. Since the temporary receiver is appointed *ex parte* and his appointment is mandatory, where the requisite facts are alleged, it is entirely unreasonable to suppose that the legislature intended to vest title to all the corporate assets in such a receiver.

Petitioner's claim to the contrary is founded upon the fallacious argument that the constructive service provided for by the statute would be without due process unless the prior appointment of the temporary receiver had, in and of

itself, vested the corporate assets in him. That argument overlooks the requirement of subdivision 5 that, as a prerequisite to service by publication, a demand must first be served upon a person holding property of the corporation or against whom it has a claim. Under subdivision 20, such a demand results in putting the receiver in possession of the property and, like the levy made under a warrant of attachment, furnishes the jurisdictional foundation for constructive service. Cf. *Dimmerling* v. *Andrews*, 236 N. Y. 43.

It is, therefore, submitted that the District Court and the Court of Appeals correctly disposed of the first issue presented by the writ of certiorari by holding that petitioner did not acquire title to the debt in suit solely by virtue of his appointment as temporary receiver. They were thus properly brought to the second issue presented by the writ, namely, a consideration of whether the "freezing" regulations, as amended on June 14, 1941, prevented such title from vesting in petitioner upon his subsequent appointment as permanent receiver. On that issue both Courts adopted the Government's position, and on this appeal defendant ASCAP, as it did below, while joining in his argument, will leave to the Attorney General the burden of sustaining that determination.

Petitioner's assertion that in construing Section 977(b) the lower courts disregarded this Court's admonition "against construing state statutes before they have been construed by the state courts themselves" (Pet. Br. p. 21) is wholly unwarranted. The federal courts obviously had jurisdiction over this controversy (*Markham* v. *Allen*, 326 U. S. 490), and the mere fact that a question of state law was incidently involved furnished no ground for a refusal

to exercise that jurisdiction. *Meredith* v. *Winter Haven*, 320 U. S. 228. This is particularly true in a case such as this, where no claim can be made that the decision below constitutes a departure from state law (*McGregor* v. *State Mutual Co.*, 316 U. S. 280) and where, as the Court of Appeals pointed out, "unusually important federal rights" are involved (II R. 46).

Prior to the institution of this action, defendant ASCAP was placed in serious jeopardy and threatened with double liability by reason of the conflicting claims being asserted against it by defendant Propper and the Custodian. Propper was pressing his claim in the New York State Courts and the Custodian had refused to become a party to that litigation. Moreover, the State courts had held that the Custodian could not be subjected, against his wishes, to their jurisdiction (270 App. Div. 890). Accordingly, the institution of this action in the United States District Court for the Southern District of New York brought all of the parties in interest into a single forum for the first time. That forum was the only one having jurisdiction over all the parties, and properly equipped to finally determine the controversy.

Under these circumstances the exercise of federal jurisdiction was essential to protect defendant ASCAP from the possible risk of double liability. Any disposition of this appeal should give due consideration to that defendant's position and safeguard it against being subjected to these conflicting claims in the future.